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10 | Attorneys for Defendant SEAGATE TECHNOLOGY, LLC

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

16 | IN RE SEAGATE TECHNOLOGY, LLC  
LITIGATION

Case No. 3:16-cv-00523 JCS

18 | CONSOLIDATED ACTION

**SEAGATE TECHNOLOGY LLC'S  
MOTION FOR ADMINISTRATIVE  
RELIEF PURSUANT TO LOCAL RULE  
7-11: (1) TO STRIKE PORTIONS OF  
PLAINTIFFS' REPLY IN SUPPORT OF  
CLASS CERTIFICATION MOTION, OR,  
IN THE ALTERNATIVE (2) FOR LEAVE  
TO FILE A SUR-REPLY**

## Underlying Motion Hearing:

Date: March 30, 2018

Time: 9:30 a.m.

Dept.: Hon. Joseph C. Spero  
Courtroom G, 15th Floor

1 Pursuant to Civil Local Rule 7-11, Defendant Seagate Technology LLC (“Seagate”) hereby  
 2 moves for administrative relief in the form of an order striking portions of Plaintiffs’ reply brief on  
 3 class certification (“Reply”).<sup>1</sup> ECF No. 158-2. The Reply advances new “pure omission”  
 4 theories of liability based on “reliability”—as opposed to omissions arising out of affirmative  
 5 representations about AFR and RAID. *Id.* at 1:3-20, 2:13-6:9. Plaintiffs’ new theories are outside  
 6 the scope of this matter, as narrowed by the Court’s Order on Seagate’s Motion to Dismiss the  
 7 Second Consolidated Amended Complaint. Order Granting in Part and Den. in Part Mot. to  
 8 Dismiss Second Consolidated Amended Compl., ECF No. 100 at 25:3-10. Nor did Plaintiffs  
 9 advance these theories as a basis for class certification in their opening brief. *See* ECF No. 135.<sup>2</sup>  
 10 Seagate should not be required to respond to arguments raised for the first time on reply.  
 11 Accordingly, this Court should strike the portions of Plaintiffs’ Reply that assert new disclosure  
 12 obligations. *See, e.g., Traschel v. Buchholz*, No. C-08-02248 RMW, 2009 WL 839117, at \*4  
 13 (N.D. Cal. Mar. 30, 2009) (striking portions of plaintiffs’ reply that raised new arguments not  
 14 addressed in prior briefing).

15 In the alternative, Seagate seeks leave to file the six-page sur-reply brief attached hereto  
 16 as Exhibit A. Seagate is mindful of the fact that sur-replies are generally disfavored. However,  
 17 Plaintiffs’ Reply contains new arguments that—although available to Plaintiffs at the time of their  
 18 opening motion—Seagate has not had an opportunity to address. For Seagate to address these  
 19 new arguments prior to the hearing—and to afford the Court the opportunity to hear both sides’  
 20 points on these issues—Seagate respectfully requests leave to submit the attached short sur-reply  
 21 brief. Indeed, Courts allow sur-replies in precisely these circumstances. *Crump v. City & County*

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 23 <sup>1</sup> Plaintiffs’ Reply was filed on February 20, 2018, 38 days before the March 30, 2018  
 24 hearing on class certification. As the Court is aware, Civil L.R. 7-2 requires that a motion hearing  
 25 be set at least 35 days after the notice of motion is filed. Three days was insufficient time to  
 26 prepare a noticed motion, so Seagate is proceeding by administrative motion to enable the Court to  
 27 consider its motion and surreply concurrently with the other class certification briefing. If the  
 28 Court prefers, Seagate can file a noticed motion, but that would presumably require a continuance  
 of the hearing date.

<sup>2</sup> Indeed, Plaintiffs expressly chose not to advance such theories in prior briefing. Pl.s’  
 Opp’n to Mot. to Dismiss, ECF No. 72 at 9:19-10:5 (advancing theory of omissions based on  
 affirmative misrepresentations to avoid acknowledged split of authority on whether a duty to  
 disclose exists for pure omissions claims in the absence of a safety concern).

1 *of San Francisco*, 2007 U.S. Dist. LEXIS 58768 at \*5 (N.D. Cal. August 1, 2007) (allowing sur-  
 2 reply where defendant raised new arguments in its reply brief); *Pfohl v. Farmers Ins. Group*, 2004  
 3 U.S. Dist. LEXIS 6447 at \*4 n.1 (C.D. Cal. March 1, 2004) (permitting sur-reply where plaintiff  
 4 submitted new evidence and raised new argument in reply); *Hammet v. Am. Bankers Ins. Co.*, 203  
 5 F.R.D. 690, 695 n. 1 (S.D. Fla. 2001) (“Because Plaintiff presented new arguments and a new  
 6 theory for certification in her Reply the Court will grant Defendants’ Motion for Leave to File a  
 7 Sur-Reply. . . .”).

8 It is well-established that a moving party may not introduce new facts or legal theories on  
 9 reply. See *Rollins v. Dignity Health*, 19 F. Supp. 3d 909, 918 (N.D. Cal. 2013) (declining to  
 10 consider new arguments moving party failed to raise prior to reply brief); *Nevada v. Watkins*, 914  
 11 F.2d 1545, 1560 (9th Cir. 1990) (“[Parties] cannot raise a new issue for the first time in their reply  
 12 briefs.”). Good cause for granting a motion exists where a moving party presents new material on  
 13 reply. *Altavion, Inc. v. Konica-Minolta Systems Laboratory, Inc.*, No. C 07-06358 MHP, 2008  
 14 WL 2020593, at \*1 n.1 (N.D. Cal. May 8, 2008) (“Defendants also filed a motion for leave to file  
 15 a sur-reply in opposition to plaintiff’s motion to remand, arguing that this court should grant leave  
 16 because plaintiff’s reply brief posed new arguments and relied upon cases which had not been  
 17 previously cited. Because defendant has shown good cause, defendants’ motion is GRANTED.”).

18 Accordingly, Seagate respectfully requests that this Court strike the portions of Plaintiffs  
 19 Reply that raise new arguments not asserted in their opening brief.<sup>3</sup> Alternatively, Seagate  
 20 requests that this Court grant leave to file the attached sur-reply.

21 Dated: February 27, 2018

22 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

24 By \_\_\_\_\_ /s/ Anna S. McLean  
 25 \_\_\_\_\_ ANNA S. McLEAN

26 Attorneys for SEAGATE TECHNOLOGY, LLC

27 \_\_\_\_\_  
 28 <sup>3</sup> See Reply, ECF No. 158-2 at 1:3-20, 2:13-6:9, which address the new “pure omissions” theory.